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Supreme Court of the United States

October Term, 1972

No. _____

Jesse Alexander Eller, *et al.*, Petitioners

v.

Board of Education of Prince George's County, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH DISTRICT

Jesse Alexander Eller, on behalf of himself and other citizens of Prince George's County, Maryland, similarly situated, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case entered on October 12, 1972.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A., *infra*, p. A-1) is reported *sub nom. Sylvester J. Vaughns, et al.* v. *Board of Education of Prince George's County, et al.*, at ___ F.2d ____. The opinions and orders of the United States District Court for the District of Maryland were issued July 25,

1972, (J. A. 256a)[1] and August 31, 1972, (J. A. 326a), respectively.

JURISDICTION

The judgment of the Court of Appeals (Appendix B, infra, p. B-1) was entered on October 20, 1972. We invoke the jurisdiction of this Court under 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISIONS & STATUTES INVOLVED

Amendment V, Constitution of the United States,-

> "No person shall . . . be deprived of life, liberty, or property, without due process of law";

Title 20, United States Code, Section 1232a –

> "No provision of the Act of September 30, 1950, Public Law 874, Eighty-first Congress; the National Defense Education Act of 1958; the Act of September 23, 1950, Public Law 815, Eighty-first Congress; the Higher Education Facilities Act of 1963; the Elementary and Secondary Education Act of 1965; the Higher Education Act of 1965; the International Education Act of 1966; or the Vocational Education Act of 1963 shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system, or over the selection of library resources, textbooks, or other printed or published instructional materials by any educational institution or

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[1] "J.A." references are to the Joint Appendix to Briefs as filed in the United States Court of Appeals on or about October 2, 1972.

school system, or to require the assignment or transportation of students or teachers in order to overcome racial imbalance."

Title 42, United States Code, Section 2000c(b) –

"'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but "desegregation" shall not mean the assignment of students to public schools in order to overcome racial imbalance."

QUESTIONS PRESENTED

The District Court, on the sole basis of an incomplete factual record stipulated to by the parties other than Petitioners, who were not then intervenors in the proceeding, entered its July 25, 1972, order granting plaintiff's motion for summary judgment and finding that the school system of Prince George's County, Maryland, was not in compliance with the standards enunciated by this Court in its *Brown*[2], *Brown II*,[3] and *Swann*[4] decisions.[5] Additionally, the Court ordered the defendant Board of Education to submit a plan that would

---

[2]*Brown* v. *Board of Education*, 347 U.S. 438 (1954).

[3]*Brown* v. *Board of Education*, 349 U.S. 294 (1955).

[4]*Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

[5]That decision conflicts with the State Court's ruling that *de facto*, not *de jure*, segregation prevailed in the Prince George's County school system, since adoption by the School Board on November 11, 1969, of the desegregation plan which is presently in effect, *Eugene Borders, et al.* v. *Board of Education of Prince George's County, et al.*, 290 A.2d 510 (1972), presently pending on petition for writ of certiorari before this Court on other grounds, Oct. Term 197 , No. .

result in a racially balanced school system. After the defendant Board refused on a four-to-four vote to approve and submit a massive bussing plan to the Court, Petitioners sought and were granted intervention to participate in the proceedings. However, intervention was limited by the Court solely to a submittal of a plan for "desegregation" and development of the record on that issue. The Court specifically prohibited and will continue to prohibit Petitioners in the further hearings scheduled to reconvene on December 4, 1972, from presenting evidence and developing a full evidentiary record, through cross-examination and otherwise, on the basic issue of the school system's compliance or noncompliance with constitutional standards. The Court's ruling on that basic issue was without benefit of certain relevant facts. Nor did the Court permit the taking of evidence in explanation of facts set forth in the Joint Stipulation – evidence that is crucial to a determination of causation of any racial imbalance and therefore bearing directly upon the *de jure - de facto* issue. For example, the fact that the Department of Health, Education and Welfare (H.E.W.) had ruled on November 19, 1969, that the school system of Prince George's County had met the requirements of Title VI of the Civil Rights Act of 1964 through its plans submitted for the desegregation of all elementary schools, of all secondary schools, and of the professional staffs of these schools (Appendix C, *infra,* p. C-1) was not presented to the Court. That desegregation plan was placed in effect on November 11, 1969, and remains in effect today without any change through legislation (state or county) or otherwise. As stated above, the Maryland Court of Appeals concluded that *de jure* segregation does not exist in the Prince George's County school system. *Borders, supra.*

The Court of Appeals, in its decision in this case, ignored Petitioners' request to review the July 25 order, or, in the alternative, to require the record to be reopened on remand to permit Petitioners and others to introduce into evidence relevant and pertinent factual data on the *de facto - de jure* issue. The questions thus presented are:

(1) Whether this Court should decide conflicting state and federal court determinations on an issue of federal substance.

(2) Whether *de jure* segregation can occur after the previously unlawful dual school system has been effectively dismantled through means of a desegregation plan that has been found to be in full compliance with Title VI of the Civil Rights Act of 1964 without further change (legislative or otherwise) made in that plan after it was fully implemented and remains in force today.

(3) Alternatively, whether Petitioners would be denied due process of law and/or would suffer irreparable harm unless the proceeding be remanded with directions to permit Petitioners to fully participate in *all* phases of the proceeding including the reopening of the record on the *de facto - de jure* issue so as to allow the introduction into evidence of H.E.W's compliance report and other relevant and pertinent factual data, including but not limited to, the shifting housing patterns and other causes that have resulted in changing the racial make-up of the schools since 1969.

STATEMENT

This petition seeks review of a decision of the Court of Appeals that refused to consider the substantive issues raised by Petitioners in challenging the lower Court's final order of July 25, 1972, wherein it concluded that unlawful segregation exists in the Prince George's County school system. While the Court below recognized our challenge of that order, it nevertheless avoided responding to the merits of our contentions and instead dealt solely with the issue of whether the lower Court's later order, regarding the submission of plans for "desegregation," was ripe for judicial review. Finding that it was not ripe, the Court below remanded the full proceeding to the lower Court.

Plaintiffs, black citizens of Prince George's County, Maryland, filed a complaint alleging that the school system of Prince George's County did not meet constitutional standards and thus deprived them, and citizens similarly situated, of the equal protection of the laws of this nation. The gist of plaintiffs' complaint was that vestiges of the pre-*Brown I* dual school system had not been dismantled. To expedite consideration of their complaint, plaintiffs and defendants filed with the District Court a Joint Stipulation of Facts, which set forth, *inter alia*, certain statistical data pertaining to the racial composition of the schools within defendants' system. The Joint Stipulation also included, in two places, a letter dated April 3, 1969, from H.E.W. to the Superintendent of Schools submitting certain proposals and suggestions for desegregation of the County's schools (J.A. 95a, 220a). However, the parties did not place into the Joint Stipulation the subsequent fact that on November 19, 1969, H.E.W. found that the school system was in full compliance with Title VI of the Civil Rights Act of 1964.

Based solely on the content of the Joint Stipulation of Facts, the District Court granted plaintiffs' motion for summary judgment (J.A. 255a). The Court found that there was a lack of desegregation in the schools that, "... stem[med] from a pre-*Brown I* segregated system which has never been effectively dismantled ..." (J.A. 261a). Thereupon, the Court ordered the School Board to submit to it a desegregation plan that would conform to the constitutional criteria established by this Court in its *Brown I*, *Brown II*, and *Swann* decisions. The School Board, on a four-to-four vote refused to adopt a massive bussing plan presented to it by its staff and instead submitted a report to the Court on its endeavors to comply with the Court's mandate (J.A. 265a).

Petitioners filed its petition to intervene in this proceeding to protect their rights and contest the Court's erroneous findings of unlawful segregation. Petitioners had theretofore anticipated that counsel for the School Board would have been

instructed to contest that finding. However, no such instruction was given and the petition to intervene followed.

The Court recognized Petitioners' standing to intervene and no formal response in opposition to the petition was filed by any party. However, in its order permitting intervention (attached hereto as Appendix D, *infra*, p. D-1), the Court restricted Petitioners' right to present evidence on the *de jure - de facto* issue (Appendix D, *infra*, p. D-2):

> . . . unless this Court's order of July 25, 1972, is reversed in whole or in part by the United States Court of Appeals for the Fourth Circuit, the intervenors shall not seek to present to this Court any evidence, testimonial or documentary, other than that which was presented to this Court by joint stipulation of the parties prior to July 25, 1972, and made a matter of record herein, relating to the issue of compliance or non-compliance with the standards of *Brown I*, *Brown II*, and *Swann* . . .

The Court's order of September 19, 1972, permitting intervention was issued 27 days after our petition to intervene was filed, which petition contained allegations of relevant facts omitted from the Joint Stipulation. Intervention was made effective as of September 1, 1972. A copy of that petition along with a Memorandum of Law submitted to the Court in support of the petition, upon direction of the Court, is attached hereto as Appendix E, *infra*, p. E-1. Further, Petitioners on September 7, 1972, 20 days prior to the Court's order, filed a "Motion for New Trial, Motion to Reopen the Record, etc." again asserting the necessity to reopen the record for further relevant evidence bearing on the constitutional issue involved in this proceeding. A copy of that motion is being transmitted to the Court from the lower Court. The Court has not acted on that motion, but instead issued its order precluding Petitioners from presenting evidence on the constitutional issue. The appeal to the Court of Appeals followed.

REASONS FOR GRANTING THE WRIT

1. In the *Borders* case, *supra*, the Court of Appeals of Maryland found that in dealing with the school system of Prince George's County, *de facto*, rather than *de jure*, segregation prevailed (290 A.2d at 516):

> . . . Although it may be argued that *Swann* represents a case wherein *de jure* segregation exists in the school system which was brought about as a direct result of state action, whereas, by contrast, in the present case, *de facto* segregation prevailed . . .

Borders involved a question of the constitutionality of the Prince George's County School Board's resolution of November 11, 1969, adopting a plan for desegregation of its school system. That plan is the one that is presently in existence and was approved by H.E.W. as placing the Prince George's County school system in full compliance with the Civil Rights Act of 1964. The Federal District Court, on the other hand, by its order of July 25, found the school system to be in violation of the mandates of the constitution as enunciated by this Court.

The conflicting decisions in those lower Courts require this Court to exercise its discretion and grant our writ. Rule 19; see also, *Plumbers' Union* v. *Door County*, 359 U.S. 354 (1959). There is no doubt that the issue involved is one of federal substance. It involves a question of prime concern to the community and its citizens because it involves the education of its youth.

2. There is no question that prior to *Brown I*, Prince George's County operated a dual school system. Thereafter, the School Board with the aid of H.E.W. sought to correct its system and to comply with the mandates of the law. Proposals and suggestions were tendered by H.E.W. throughout those years and are evidenced by the letter of April 3, 1969 (J.A. 95a, 220a). Compliance with those proposals and suggestions is

evidenced by H.E.W's letter of November 19, 1969 – a copy of which is attached hereto as Appendix C, *supra*, p. C-1. Thus, the unlawful dual school system was effectively dismantled and a lawful unitary system instituted by at least November 11, 1969, when the School Board adopted and implemented the existing desegregation plan. The mandates of *Brown I*, *Brown II*, and *Swann* were thereby enforced.

The District Court's decision on the constitutional issue is devoid of any analysis of the facts and issues involved. Thus, although the Court gave lip service to the acknowledged changing housing patterns, it made no attempt whatsoever to determine whether or not the alleged racial imbalance in a limited number of schools resulted from such changing housing patterns. The Court, in essence, concluded that if race balance is not proportionate throughout the entire school system, whatever the cause, that system does not comply with constitutional standards. Such reasoning lacks merit since "... neighborhood school plans, when impartially maintained and administered, do not violate constitutional rights even though the result of such plans is racial imbalance ..." (*Keyes* v. *School District Number One, Denver Colorado, et al.*, 445 F.2d 990, 999 (CA 10, 1971), certiorari granted 404 U.S. 1036).

The U. S. District Court for the District of Colorado succinctly set forth the difference between *de jure* and *de facto* segregation when it stated (313 F. Supp. at 73-74):[6]

> ... From the cases, we gleaned the following principles as essentials of *de jure* segregation:
>
> (1) The State, or more specifically, the school administration, must have taken some action with a purpose to segregate;

[6] *Keyes* v. *School District No. One, Denver, Colorado, et al.*, 313 F. Supp. 61 (1970); modified, 445 F.2d 990 (CA 10, 1971); certiorari granted, 404 U.S. 1036.

(2) This action must have in fact created or aggravated segregation at the school or schools in question.

(3) A current condition of segregation must exist; and

(4) There must be a casual connection between the acts of the school administration complained of and the current condition of segregation.

The first of the above requirements actually consist of two elements – state action and a purpose to segregate. It seems unnecessary to elaborate on the element of state action at this time, since plaintiffs here emphasize only affirmative official acts.

... The important distinguishing factor between *de facto* and *de jure* segregation is purpose to segregate. *See, e.g. Board of Education, etc.* v. *Dowell,* 375 F.2d 158 (10 Cir. 1967), cert. denied. 387 U.S. 931, 87, S. Ct. 2054, 18 L.Ed. 2d 993 (1967); *Downs* vs. *Board of Education of Kansas City*, 336 F.2d 988 (10 Cir. 1964), cert. denied, 380 U.S. 914, 85 S.Ct. 898, 13 L.Ed.2d 800 (1965) ...

In its July 25 order the Court was content with a bare bones factual stipulation. It made no finding as to the motivation of the Board when it enacted the plan currently in effect nor of the causation of the alleged racial imbalance in a very limited number of schools. The Court was content merely to rule on the abstract factual presentation. Based upon the issuance of its restrictive order granting these Petitioners' intervention the Court is not disposed toward the development of a proper and complete evidentiary record on the *de jure - de facto* issue. Thus, among other things, the Court has ignored both the

State Court's and H.E.W's findings of full compliance with constitutional standards and has assumed that a prior dismantled dual school system can once again become an unlawful system without enactment of legislation or overt acts of segregation by the School Board.

3. In accordance with the District Court's order of August 31, 1972, hearings are to be resumed on December 4, 1972, for the purpose of formulating a Court approved plan that would eliminate the alleged "vestiges of a dual school system," with a view toward implementation in January 1973. To date, all plans submitted by the plaintiffs and defendants and considered by the Court contemplate massive bussing of pupils beyond their neighborhood schools. Basic to the implementation of any plan is the sustainability, upon review, of the District Court's order of *de jure* segregation. Implementation of a plan is imminent in January 1973. If judicial review of this Court is not accepted now, a subsequent finding of error on the lower Court's *de jure* conclusion will be of little solace since these Petitioners' civil rights will have been violated in that they have been assigned and transported by edict of a federal District Court to schools based on the color of their skin for the purpose of achieving a racial balance in a *de facto* school system.

As a consequence, this Court should remand the proceeding with directions to reopen the constitutional issue and permit Petitioners and all other parties to present evidence on that issue. Otherwise, these Petitioners will be denied due process of law.

CONCLUSION

Wherefore, for the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Emmett H. Nanna, Jr.
Richard A. James
NANNA & JAMES
5132 Baltimore Ave.
Hyattsville, Md. 20781
Attorneys for Intervenors-Appellants

Of Counsel:

George P. Lewnes
Cyril S. Wofsy

November 30, 1972

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of November, 1972, two copies of the foregoing brief were mailed, postage prepaid, to Paul M. Nussbaum, Esquire, 3723 - 34th Street, Mt. Rainier, Maryland, 20822; Richard V. Falcon, Esquire, 500 West Baltimore Street, Baltimore, Maryland, 21201; and Kenneth L. Johnson, Esquire, and Gerald A. Smith, Esquire, Suite 1500 American Building, Baltimore, Maryland, 21202.

By _____
Emmett H. Nanna, Jr.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 72-2129

SYLVESTER J. VAUGHNS, JR., by his father and next friend, SYLVESTER J. VAUGHNS; TOIKA E. WHEATFALL, by her father and next friend, WALTER E. WHEATFALL; JAMES R. L. BROOKS, JR., by his father and next friend, JAMES R. L. BROOKS; REGINALD WIGGS, by his father and next friend, HOSEA WIGGS; REGINALD A. JACKSON, JR., by his father and next friend, REGINALD A. JACKSON; DENISE A. LIGON, by her father and next friend, DENNIS J. LIGON, JR.; CAROLYN GILMORE, by her father and next friend, STERLING GILMORE; JOHN A. WILLIAMS, by his father and next friend, JOHN J. WILLIAMS, individually and on behalf of all other persons similarly situated,

Appellants,

versus

BOARD OF EDUCATION OF PRINCE GEORGE'S COUNTY; A. JAMES GOLATO, President of the Board of Education of Prince George's County and CHESTER E. WHITING, JOANNE T. GOLDSMITH, DR. RODNEY W. JOHNSON, SUE V. MILLS, DR. J. RIGHTON ROBERTSON, JESSE J. WARR, JR., PHYLLIS E. WILLIAMS, RUTH S. WOLF, members of the Board of Education of Prince George's County; and DR. CARL W. HASSELL, SUPERINTENDENT of Schools of Prince George's County,

Appellees,

No. 72-2130

SYLVESTER J. VAUGHNS, JR., by his father and next friend, SYLVESTER J. VAUGHNS; TOIKA E. WHEATFALL, by her father and next friend, WALTER E. WHEATFALL;

JAMES R. L. BROOKS, JR., by his father and next friend, JAMES R. L. BROOKS; REGINALD WIGGS, by his father and next friend, HOSEA WIGGS; REGINALD A. JACKSON, JR., by his father and next friend, REGINALD A. JACKSON; DENISE A. LIGON, by her father and next friend, DENNIS J. LIGON, JR.; CAROLYN GILMORE, by her father and next friend, STERLING GILMORE; JOHN A. WILLIAMS, by his father and next friend, JOHN J. WILLIAMS, individually and on behalf of all other persons similarly situated,

Appellees,

versus

BOARD OF EDUCATION OF PRINCE GEORGE'S COUNTY; A. JAMES GOLATO, President of the Board of Education of Prince George's County and CHESTER E. WHITING, JOANNE T. GOLDSMITH, DR. RODNEY W. JOHNSON, SUE V. MILLS, DR. J. RIGHTON ROBERTSON, JESSE J. WARR, JR., PHYLLIS E. WILLIAMS, RUTH S. WOLF, members of the Board of Education of Prince George's County; and DR. CARL W. HASSELL, Superintendent of Schools of Prince George's County,

Appellants.

No. 72-2131

BOARD OF EDUCATION OF PRINCE GEORGE'S COUNTY; A. JAMES GOLATO, President of the Board of Education of Prince George's County and CHESTER E. WHITING, JOANNE T. GOLDSMITH, SUE V. MILLS, DR. J. RIGHTON ROBERTSON, JESSE J. WARR, JR., PHYLLIS E. WILLIAMS, RUTH S. WOLF, members of Prince George's County Board of Education; and DR. CARL W. HASSELL, Superintendent of Schools of Prince George's County,

Appellees,

versus

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JASON ALEXANDER ELLER, MARTHA STREET ELLER, BRENDAN EDWARD LYNCH, MARJORIE ELAINE LYNCH, KENNETH PHILLIP WHITEMORE, BETTE ANN WHITEMORE, ARTHUR EMANUEL DINERMAN, JANET AVIS DINERMAN, MORRIS EDWARD SAMPSON, HELMA OLINDA SAMPSON, WILLIAM RAYMOND LEER, MARGARET STREET LEER, LEO PAUL CHABOT, WANDA MAXINE CHABOT, JOHN EUGENE SPAULDING and BERNADINE LANE SPAULDING,

Appellant

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT MARYLAND, AT BALTIMORE. FRANK A. KAUFMAN, DISTRICT JUDGE.

(Argued October 2, 1972. Decided October 12, 1972.)

Before HAYNSWORTH, Chief Judge, and WINTER, CRAVEN, BUTZNER, RUSSELL and FIELD, Circuit Judges, sitting en banc.

Richard V. Falcon and Kenneth L. Johnson (Gerald A. Smith, and Howard, Brown and Williams on brief) for Appellees in No. 72-21 and 72-2131 and for Appellants in No. 72-2130; Paul M. Nassbaum Counsel for the Board of Education of Prince George's County, Maryland, (Stanley H. Goldstein on brief) for Appellees in No. 72-2129 and for Appellants in No. 72-2130; Emmett H. Nanna, Jr. (Richard M. James, George P. Lewnes and Cyril S. Wofsy on brief Appellants in No. 72-2131.

D CLOSE TO EDGE

PER CURIAM:

In this school case, the District Judge entered an order in July 1972 declaring the composition of the schools and the assignment of pupils in Prince George's County Maryland not to be in compliance with the constitutional requirements. There was a subsequent order in August, directing the preparation of final desegregation plans by November 1972 and their submission to the Court early in December. That order scheduled a hearing on the plans in December and provided that the plans, with respect to the primary schools and the junior high schools, would be made effective on January 29, 1973, the date of the semester break. With respect to the senior high schools, however, the order provided that the plans would not be placed into effect until September 1973.

The right to take an appeal from each of the orders under the present circumstances is contested, and the resolution of those procedural questions involve difficult considerations. We think it unnecessary to attempt to resolve them, for we perceive among the substantive questions tendered, only one of substantiality, and that one is, and will be, within the bosom of the District Court.

The general rule requires that plans for the desegregation of school systems be made effective as soon as they

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practically may be without serious disruption to the educational process.* It is contended here that, in light of the general rule the District Court should not have included in its August 1972 order a provision postponing implementation of the plan with respect to the senior high schools until September 1973. With the possible exception of the twelfth grade, the graduating class, it is difficult to find justification for that portion of the order on this record, when the plans are as yet unformulated and the advantages of coordinating the change at all levels cannot be weighed against what difficulties may be encountered in the implementation of the plan for the senior high schools at mid semester.

It seems clear to us, however, that the timing of the implementation of the plans, when approved, at all levels is subject to reconsideration in the District Court in light of the actual plans and the extent of the changes within the school system which their implementation will require.

This question should first be addressed to the District Court and considered by it in light of the situation as it shall appear when otherwise approvable plans are in hand.

---

* Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969); Carter v. West Feliciana Parish School Board, 396 U.S. 226 (1969).

UND TOO CLOSE IN CENTER

Since there appears to be an [illegible] substantiality ready for decision in this [illegible] undertake resolution of the procedural questions. The case will be remanded for further proceedings in the District Court.

The mandate shall issue forthwith.

Remanded.

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JUDGMENT

APPENDIX B – 1

United States Court of Appeals

for the

Fourth Circuit

No. 72-2129

SYLVESTER J. VAUGHNS, JR., by his father and next friend, SYLVESTER J. VAUGHNS; TOSKA E. WHEATFALL, by her father and next friend, WALTER E. WHEATFALL; JAMES R. L. BROOKS, JR., by his father and next friend, JAMES R. L. BROOKS; et als.,

Appellants,

versus

BOARD OF EDUCATION OF PRINCE GEORGE'S COUNTY; A. JAMES GOLATO, President of the Board of Education of Prince George's County, et als.,

Appellees.

Appeal from the United States District Court for the ----------

District of Maryland.

This cause came on to be heard on the record from the United States District Court for the ---------- District of Maryland

, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that

the case is remanded to the United States District Court for the District of Maryland, at Baltimore, for further proceedings consistent with the opinion of this Court filed herewith. The mandate shall issue forthwith.

FILED

OCT 12 1972

WILLIAM K. SLATE, II
CLERK

William K. Slate II
CLERK

UND TOO CLOSE IN CENTER

APPENDIX C

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Region III
220 Seventh Street, N. E.
Charlottesville, Virginia 22901

OFFICE FOR CIVIL RIGHTS

Mr. I - 3562

Mr. William S. Schmidt
Superintendent
Prince George's County Schools
Upper Marlboro, Maryland 20870

Dear Mr. Schmidt:

I have received and reviewed the plan for the desegregation of Fairmont Heights Senior High School and Mary Bethune Junior High School, which was approved by the Prince George's County Board of Education on November 13.

The plan has been submitted to this office in response to the request I made in my letter of September 2, 1969. At that time, I stated that measures previously submitted regarding the desegregation of certain elementary schools and of faculty would be recommended to the Director of the Office for Civil Rights as acceptable. My request called for the submittal of a plan which would accomplish the desegregation of all secondary schools, but directed specifically to Fairmont Heights Senior High School and Mary Bethune Junior High School.

With concurrence of the Director of the Office for Civil Rights, I am authorized to inform you that the plans submitted for the desegregation of all elementary schools and all secondary schools and for the professional staffs of these schools are accepted as meeting the requirements

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of Title VI of the Civil Rights Act of 1964. Modifications or amendments to the plans may be proposed at any time, and their acceptability will be determined in view of the requirements of the law.

I wish to commend the Board of Education for its forthright leadership and high sense of responsibility in adopting measures that not only meet the requirements of the law but will also provide an equal educational opportunity for all children of the Prince George's County Public Schools.

Further, I express my appreciation of the courtesies and cooperation extended to me and my staff by you and your associates during our visits to Upper Marlboro.

Sincerely yours,

Eloise Severinson, Ph. D.
Regional Civil Rights Director

cc: Honorable James A. Sensenbaugh
Chief State School Officer

UND TOO CLOSE IN CENTER

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

SYLVESTER J. VAUGHNS, JR., ET AL. :

:

V. : CIVIL NO. 72-325-K

:

BOARD OF EDUCATION OF PRINCE GEORGE'S COUNTY, ET AL. :

:

O R D E R

Upon consideration of the Motion to Intervene filed by Jesse Alexander Eller, et al., it is hereby, this 19th day of September, 1972, effective as of September 1, 1972,

ORDERED, ADJUDGED and DECREED, by the United States District Court for the District of Maryland, that the Motion to Intervene shall and the same is hereby granted upon the following conditions:

1. Intervenors are satisfied with the limited rights accorded to their counsel during the proceedings which took place in this Court from the time of the filing of the Motion to Intervene and the time of the filing of this Court's opinion on August 31, 1972.

2. Intervenors will in no way attempt to delay any future hearing in this case. Further, the intervenors agree they will interpose no objection to evidence being presented in any form or by any procedure agreed to by counsel for plaintiffs and defendants and approved by this Court.

3. If it shall appear that the testimony of any witness called by intervenors to testify in this case can be expected to cause substantial additional costs or expenses, the question of whether the intervenors shall be required to give satisfactory assurances of their financial ability to pay such costs and expenses in the event it shall be determined by a court having jurisdiction in the premises that they should do so, will be argued

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and ruled upon by this Court prior to the taking of such testimony.

4. If the intervenors desire to note an appeal or file a petition for certiorari or other review from any order in this case filed by any court having jurisdiction in the premises, they shall so advise counsel for plaintiffs and defendants in advance of such filing. In addition, intervenors hereby agree that if they so advise counsel for plaintiffs and defendants, counsel for plaintiffs or counsel for defendants, or both, shall have the opportunity to oppose the noting of such an appeal or the filing of such a petition for certiorari or other review, and, in addition, the opportunity to seek to present to a court having jurisdiction in the premises the question of whether intervenors shall be required, in advance of noting such appeal or such petition, to give satisfactory assurances of their financial ability to pay such costs and expenses as may be incurred by the prosecution of such appeal or such petition.

5. The pleading entitled "Motion for New Trial, Motion to Reopen the Record, Petition for Reconsideration, and Alternatively, Petition for Clarification," filed by intervenors is accepted by the Court as an amicus filing as of September 8, 1972 and shall be afforded no other status. In addition, unless this Court's order of July 25, 1972 is reversed in whole or in part by the United States Court of Appeals for the Fourth Circuit, the intervenors shall not seek to present to this Court any evidence, testimonial or documentary, other than that which was presented to this Court by joint stipulation of the parties prior to July 25, 1972 and made a matter of record herein, relating to the issue of compliance or non-compliance with the standards of Brown I, Brown II, and Swann, as opposed to evidence relating to questions pertaining to type and timing of relief. Intervenors shall of course have the opportunity to present such latter type of evidence subject to the provisions of this Order.

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6. Counsel for the parties have orally informed this Court that the within Order, is and each and every one of its terms and provisions, fully and completely acceptable to them and to their respective clients.

7. The Clerk is directed to send a copy of this Order to Richard V. Falcon, Esq., one of counsel for plaintiffs; Paul M. Nussbaum, Esq., one of counsel for defendants; and Richard A. James, Esq., counsel for intervenors.

United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

SYLVESTER J. VAUGHNS, JR., ET AL.	:	
Plaintiffs	:	
vs.	:	**Civil No. 72-325-K**
BOARD OF EDUCATION OF PRINCE GEORGE'S COUNTY, ET AL.	:	
Defendants	:	

MOTION TO INTERVENE

Comes now your Petitioners, Jesse Alexander Eller and Martha Street Eller, of 13703 Gordon Avenue, Beltsville, Maryland, 20705, Brendan Edward Lynch and Marjorie Elaine Lynch, of 13209 Lonehill Drive, Beltsville, Maryland, 20705, Kenneth Phillip Whittemore and Nellie Jean Whittemore, of 13[illegible] Hillwood Court, Beltsville, Maryland, 20[illegible], Arthur Emanuel Pinero and Janet Alvin Pinero, of 13709 Chase Terrace, Beltsville, Maryland, 20705, Norris Edward Thompson and Thelma Glinda Thompson, of 13[illegible] Lonehill Drive, Beltsville, Maryland, 20705, William Raymond Leeds and Margaret Street Leeds, of [illegible] Hillwood Court, Beltsville, Maryland, 20705, Samuel Talbot and [illegible] Talbot, of 13[illegible] Toconga Drive, Beltsville, Maryland, 20705, and Evan Eugene Spaulding and Geraldine Lane Spaulding, of 4[illegible]11 Toconga Drive, Beltsville, Maryland, 20705, by and through their attorneys, Hanna and James, and respectfully request this Honorable Court to allow the above named individuals to intervene as party plaintiffs, under Rule 24 (a)(2) of the United States Federal Court. The Petitioners state for reasons that:

1. The original plaintiffs are black adult residents of Prince George's County, having school age children in the public schools of Prince George's County, Maryland. That the original plaintiffs brought suit under Federal Civil Rule 23.

That your Petitioners are non-black adult citizens of the United States of America, Prince George's County, and taxpayers, having school age children in the public schools of Prince George's County, who also represent a class under Federal Civil Rule 23.

2. That your Petitioners represent unto this Honorable Court that they, on behalf of their children, will be bound by any judgment in the above action. The Petitioners further represent unto this Honorable Court that their interest is being inadequately represented by the present plaintiffs or the present defendants in the above case.

3. That your Petitioners position is evidenced by the fact that as of August 22, 1972, no plan has been approved by the Prince George's County Board of Education to comply with the Order of Court dated July 25, 1972.

That your Petitioners would request an opportunity to submit a de-segregation plan to this Honorable Court which would adequately protect their interests. That the present plaintiffs purpose is to achieve racial balance in the Prince George's County Public Schools through mass bussing. That your Petitioners propose to achieve racial balance through minimal bussing.

4. That although the Petitioners would cause a delay in the present suit, your Petitioners represent that this delay would not adversely effect either the original plaintiffs nor the original defendants. That the school year in Prince George's County is to begin on September 5, 1972, without a present plan for de-segregation, and to implement a plan during the school year or at any other time would cause no more hardship and expense than to implement a plan at the present time.

That under Public Law 92-318, 92nd Congress,s. 659, June 23, 1972, any plan which involves massive bussing is prohibited.

HARRIS & JAMES
ATTORNEYS AT LAW
[illegible] BALTIMORE AVENUE
HYATTSVILLE, MARYLAND
[illegible]

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5. That any massive bussing plan is a denial of the constitutional rights of those students bussed.

6. That your Petitioners request that they be allowed to present to this Honorable Court both questions of law and fact which have not been presented in the present suit, and are necessary to protect the interest of said Petitioners.

WHEREFORE, your Petitioners respectfully pray:

1. That they be permitted to intervene as party plaintiffs pursuant to Rule 24, Section 2 of the Rules of Civil Procedure for the United States District Court.

2. That no final determination be made in this cause until such time as the Petitioners shall have had an opportunity for discovery and the opportunity to submit a plan for the Court's consideration to achieve racial balance in the Prince George's County schools and to engage experts to support such plan.

Respectfully submitted,

By_____
Emmett H. Nanna, Jr.

_____
Richard A. James
Attorneys for Petitioners

POINTS AND AUTHORITIES

Rule 24 (a)(2) of the Federal Rules of Procedure.

Pellegrino vs. Nesbit, 203 F 2nd 463.

APPENDIX E-4

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

SYLVESTER J. VAUGHNS, JR., ET AL.

Plaintiffs

vs.

Civil No. 72-325-K

BOARD OF EDUCATION OF PRINCE GEORGE'S COUNTY, ET AL.

Defendants

ORDER OF COURT

Upon consideration of the aforegoing Petition to Intervene as party plaintiffs filed herein, it is thereupon this _____ day of _____, 1972, by the United States District Court for the District Court of Maryland,

1. That the parties named as Petitioners in the Petition to Intervene filed herein are hereby permitted to join in this cause of action as party plaintiffs.

2. That the Petitioners be given _____ days within which to complete discovery in the case and that the Petitioners be given an additional _____ days to produce experts and to submit a plan to submit to this Honorable Court for its consideration.

JUDGE

HANNA & JAMES
ATTORNEYS AT LAW
BALTIMORE AVENUE
LAUREL, MARYLAND

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

SYLVESTER J. VAUGHNS, JR., ET AL. :

Plaintiffs :

vs. : Civil No. 72-325-K

BOARD OF EDUCATION OF PRINCE GEORGE'S COUNTY, ET AL. :

Defendants :

MEMORANDUM OF LAW

Comes now your Petitioners, Jesse Alexander Eller and Martha Street Eller, of 12003 Gordon Avenue, Beltsville, Maryland, 20705, Brendan Edward Lynch and Marjorie Elaine Lynch, of 13229 Ronehill Drive, Beltsville, Maryland, 20705, Kenneth Phillip Whittemore, and Bette Ann Whittemore, of 4004 Hillwood Court, Beltsville, Maryland, 20705, Arthur Emanuel Dinerman and Janet Avin Dinerman, of 3609 Chase Terrace, Beltsville, Maryland, 20705, Morris Edward Sampson and Thelma Olinda Sampson, of 13223 Ronehill Drive. Beltsville, Maryland, 20705, William Raymond Leer and Margaret Street Leer, of 4003 Hillwood Court, Beltsville, Maryland, 20705, Leo Paul Chabot and Wanda Maxine Chabot, of 4010 Stoconga Drive, Beltsville, Maryland, 20705, and John Eugene Spaulding and Bernadine Lane Spaulding, of 4011 Stoconga Drive, Beltsville, Maryland, 20705, by and through their attorneys, Nanna and James, respectfully submit this Memorandum of Law in support of their motion to intervene.

Statement of the Case

This proceeding involves a challenge to the validity, under State and Federal laws, of the Prince George's County public school system. Plaintiffs, black adult residents of Prince George's County in the State of Maryland with school age children in the public schools of Prince George's County, on behalf of their school age children and other children similarly situated, seek injunctive and declaratory relief upon alleged violations of the standards established by the Supreme Court of the United States in Brown v. Board of Education, 347 U.S. 483 (1954) (Brown I) and Swan v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) (Swan). The Court, based upon "an extensive and detailed Joint Stipulation of Facts filed by both sides" (Mimeo p. 2), issued an opinion on July 25, 1972, ordering the Board of Education (Board), the Defendant herein, to submit to this Court on August 22, 1972, the so-called "Lambda plan for the secondary schools of the County" as well as "the Board's own plan for student attendance, faculty and administration (the preparation of which plan the Board is hereby ordered forthwith to commence and pursue diligently) so as to bring the Prince George's County school system into total compliance with the Brown-Swan standards to the fullest extent possible by September 5, 1972, or if that is not feasibly possible, then to bring that system into such compliance in part to the fullest extent possible by that date." [footnote omitted, mimeo p. 8]

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Pursuant to the Court's order, a meeting of the Board was held on August 21, 1972. 1/ At this meeting, the Board considered a plan that would require massive busing of school children throughout Prince George's County. 2/ That plan, however, was rejected by the Board on a four to four vote. (One member of the Board was not present at the time that votes were called-for). No other plan was considered by the Board and no instructions, to our knowledge, were given to Board's counsel as to the position he was to take before this Court in this proceeding. It is our understanding, however, that the Board, in conformity with this Court's order, submitted to the Court on August 22, 1972, its report on its meeting together with the plan rejected by it.

Our petition to intervene was filed with the Court on August 23, 1972.

Argument

Rule 24 of the Federal Rules of Civil Procedure provides for intervention, both as a matter of right and as a matter of discretion. The first section of Rule 24 provides:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statue of the

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1/ The public was permitted to attend that meeting, but was not permitted to participate therein. Additionally, a full disclosure of the agenda of that meeting was withheld from the public (see unanswered letter from George P. Lownes to Honorable Colonel Chester Whiting dated August 11, 1972, attached hereto as Appendix A). All that was ascertainable from the news media was that the Board was going to convene in response to the Court's order.

2/ It is our understanding that the plan was presented to the Board for the first time on the day of the meeting.

> United States confers an unconditioned right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter injure or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

In the event the party seeking to intervene does not qualify as of "right," Section (b) of Rule 24 permits intervention as a matter of judicial discretion:

> (b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditioned right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

In this proceeding, Petitioners are justified to intervene under either section of Rule 24. 3/ The critical tests for intervention under Rule 24(a) is (1) whether applicant has "an interest relating to the property or transaction which is the subject of the action;" (2) whether applicant is so situated that "the disposition of the action may as a practical matter impair or impede his ability to protect that interest;" and (3) whether the interest of the applicant is "adequately represented by existing parties." We believe and submit that there can be no argument as to Petitioners' compliance with tests (1)

3/ In our motion to intervene, we relied solely on Rule 24(a)(2). However, after a further and more thorough analysis, we will show herein that our intervention is also dictated by subsection (1) of 24(a) as well as permitted under Section (b) (1) and (2) of Rule 24.

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and (2) above. 4/ We shall show that Petitioners also meet test (3); that their petition was timely filed; and that they have a statutory right to intervene.

Additionally, joinder of the instant Petitioners is needed for a just adjudication as required under Rule 19 of the Federal Rules of Civil Procedure cited below in part:

> (a) Persons to be Joined if Feasible.
>
> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (1) as a practical matter impair or impede his ability to protect that interest or . . . .

The instant Petitioners individually and as a class are indeed indispensable parties to the instant suit and their joinder is necessary. Although there is "no prescribed formula for determining in every case whether a person is an indispensable party or not . . . " 5/ the test most often cited and relied upon is set forth in Shields v. Barrow, 17 How. 129, 139 (1854) where the Supreme Court defined the indispensable parties as:

> Persons who do not only have an interest in the controversy, but an interest of such a nature

---

4/ Petitioners are non-black adult citizens and taxpayers of Prince George's County having school age children attending public schools of Prince George's County. They bring this action on behalf of their children and school children similarly situated, who will be bound by any judgment rendered by this Court in this action. Accordingly, this Court should find, as it found for the original Plaintiffs, that Petitioners' "actions falls precisely within the provisions of Federal Civil Rule 23(b)(2). . .[and] shall be maintained as a class action on behlaf of all [non-] black children of school age residing within Prince George's County" (Court's order, mimeo pp. 1-2).

5/ Niles Bement-Pond Co. v. Iron Molders Union, 254 U.S. 77, 80 (1920).

> that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.

In other words, "where a person will be directly affected by a decree, he is an indispensable party . . . ." Williams v. BanKhead, 19 Wall. 563, 571 (1874).

As more fully set forth in these Petitioners' Motion to Intervene, the rights of said Petitioners will be directly affected and may be seriously and permanently injured by a decree of this Court.

Parties have been held to be indispensable because their "rights . . . are so entangled with one another that it is practically impossible in the decree to protect those who are absent, 6/ and because the decree would be of "immediate concern" to them. 7/

Finally, denial of Petitioners' Motion to Intervene would constitute denial of due process and equal protection under the constitution in that said Petitioners would be precluded from invoking the protective mantle provided by Section 803 of Public Law 92-318, to wit:

> Notwithstanding any other law or provision of law, in the case of any order on the part of any United States district court which requires the transfer or transportation of any student or students from any school attendance area prescribed by competent State or local authority for the purposes of achieving a balance among students with respect to race, sex, religion, or socioeconomic status, the effectiveness of such order shall be postponed until all appeals in connection with such

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6/ Roos v. The Texas Co., 23 F.2d 171, 173 (2nd Cir. 1927). cert den., 277 U.S. 587 (1928).

7/ In State of Texas v. Interstate Commerce Commission, 258 U.S. 158 (1922).

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order have been exhausted or, in the event no appeals are taken, until the time for such appeals has expired. This section shall expire at midnight on January 1, 1974.

Petitioners' Interests Are Not Adequately Represented By Any Party To This Proceeding

Petitioners here will urge the Court to find that the existing plan, which was "accepted as meeting the requirements of Title VI of the Civil Rights Act of 1964" by the Department of Health, Education and Welfare (HEW), 8/ is a valid school plan under the criteria of Brown and Swan. The original Plaintiffs herein urge otherwise.

Defendant, on the other hand, has not urged in our opinion the validity of the existing plan adequately, if at all, to the Court. For instance, the Joint Stipulation of Facts does not contain any reference to HEW's letter (Appendix B) that its plan conforms to the requirements of the 1964 Civil Rights Act. Additionally, the Stipulation does not reflect the fact that, if segregation exists in any of the schools (and we do not concede that it does), its existence is the result of housing patterns and not the result of retention, in any form, of the previously unlawful dual school system that predated Brown I.

Defendant did not bring those facts to the attention of the Court and, consequently, we no longer can assume that the Court will be made aware of those, and other relevant facts that are needed by it to render a proper determination herein. Accordingly, our position was not adequately

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8/ HEW's letter of November 19, 1972, to Mr. William S. Schmidt is attached hereto as Appendix B.

represented by Defendant in the prior proceedings held before this Court 9/ and, because of the Board's four-to-four rejection of the massive busing plan, there appears to be little, if any, likelihood that our position will be urged before this Court by Defendant in the subsequent proceedings. We could give specific additional details of the errors, and/or omissions of facts in the Stipulation, which we propose to correct when admitted as a plaintiff-intervenor. However, for the sake of brevity, we will not set forth those additional details, at this time, but instead will note that the Court, based on that Stipulation, concluded in its opinion that racial imbalance exists in a number of the County's schools. We believe, however, that when the Stipulation is corrected to reflect the full facts, the racial imbalance if any, found by the Court will not be the result of a de jure situation, but rather the result of factual exigencies, which are de facto in nature and permissible under constitutional criteria. 10/

9/ Petitioners had every right to anticipate that Defendant's position in this proceeding was to actively urge the validity in toto of the Board's existing plan and, thus, our position would have been adequately represented.

10/ The Court should not misconstrue Petitioners' position to mean that we, in any way, countenance segregation in the County's school system. We specifically and unequivocally reject segregated schools established on the basis of any preordained determination. It is our understanding that the existing plan is based on a valid, systematic geographical determination without any recourse to "gerrymandering" tactics. If our understanding is in error, we will urge the Court to rectify the "gerrymandered" area, but in no way, will we advocate busing as the solution. A redrafting of the geographical areas is all that will be required to rectify any "gerrymandered" area, assuming arguendo that the evidence shows that such an area exists within the County's school system. The Stipulation, however, does not give any insight on this area of relevant consideration.

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Petitioners' Motion to Intervene Is Timely Filed

As shown above, the motion to intervene was filed two days after the Board's meeting held in conformance with the Court's order. Up to that point, the proposal before this Court was the existing plan, which these Petitioners support. Further, up to that time, Petitioners had every reason to believe that their position was actively and wholeheartedly supported by Defendant particularly in light of HEW's letter of complete compliance referred to earlier. It was not until after the Board rejected the massive busing plan and refused to instruct its counsel relative to the existing plan that the rights of these Petitioners become know to them as being inadequately represented before this Court. Accordingly, we submit that our motion is timely filed and, as shown above, should be granted under Rule 24(a).

However, even should the Court disagree with our position stated above, we submit that our motion to intervene should be considered by the Court as being timely filed. A delay in moving to intervene does not require a denial of a motion to intervene once it is made. "It is undue delay ... which will require a denial ... [emphasis in original]." Wooten v. Moore, 42 F.R.D. 236, 241 (E.D.N.C., 1967). And whether or not there has been undue delay is a function, not of elapsed time since the filing of an action, but rather one of prejudice to existing parties. As aptly stated by the court in McDonald v. E. J. Lavino Co., 430 F. 2d 1065, 1073 (CA5, 1970):

> The most important consideration in determining timeliness is whether any existing party to the litigation will be harmed or prejudiced by the proposed intervenor's delay in moving to intervene . . . In fact this may be the

> only significant consideration when the proposed intervenor seeks intervention of right. As one commentator has noted: "the courts are in general agreement that an intervention of right under Rule 24(a) must be granted unless the petition to intervene would work a hardship on one of the original parties.

Similarly, in BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE, (Supp. 1970) §594, the authors state:

> In the exercise of this discretion (in determining the timeliness of intervention) the court of course will consider the time element itself but it will evaluate it in the light of all the circumstances of the case. The most important factor is whether any delay in moving for intervention will prejudice the existing parties to the case.

Where, as here, the Court will not have before it facts that are essential for its proper evaluation of the propriety of the existing plan, it is submitted that permitting Petitioners to intervene in this proceeding will not cause any prejudice or hardship on the existing parties. Unless, of course, the existing parties will allege that they will be prejudiced by the Court having all of the relevant facts before it rather than only an eclectic and slanted version thereof. Further, we do not anticipate that our intervention will cause any undue delay in this proceeding. In fact, after a reasonable opportunity to gather material and review the record made to date, we will be prepared to move expeditiously in concluding this record and submitting it to Your Honor for decision. We submit that such procedure cannot cause any hardship or prejudice on any of the participants To the contrary, all of the citizenry of Prince George's County will have been provided due process of law.

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Petitioners Have A Statutory Right to Intervene

On June 23, 1972, President Nixon signed into law an Act entitled "Education Amendment of 1972" (Public Law 92-318, 92nd Congress, S. 659)referred to previously. That Act provides, inter alia, for the intervention of parents in Court proceedings where the Court has ordered busing or is seeking to implement its busing order. (Section 804). While this case has not reached the specific posture of a court-ordered busing proceeding, it would appear that that possibility exists. If that possibility eventuates, hundreds and possibly thousands of parents may seek to intervene and re-open the record under that section of the statute. Their right to do so is unequivocal. Denial of their petitions would then be contrary to the moratorium on busing enacted by Congress. We submit that a proper reading of this Act requires the Court at this time to permit our intervention. Any other ruling would defeat that provision of the Act and will inevitably result in a confused and chaotic situation.

Conclusion

Due to the shortness of time to prepare this memorandum we have not had full opportunity for more specificity. Nevertheless we submit that for all of the foregoing reasons, and those stated in our petition to intervene, Petitioners

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respectfully move this Court to grant them the right to intervene and participate fully as plaintiffs in this proceeding.

Respectfully submitted,

By .....
Emmett H. Nanna, Jr.

Richard A. James
Attorneys for Petitioners

A & JAMES
YS AT LAW
SPICE AVENUE
E, MARYLAND
ON 7-4050

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ____ day of August, 1972, copies of the aforegoing Memorandum of Law were mailed, postage prepaid, to Paul M. Nussbaum, Esquire, 3723 34th Street, Mt. Rainer, Maryland, 20822, and to Richard V. Falcon, Esquire, 500 West Baltimore Street, Baltimore, Maryland

By_____
Richard A. James

APPENDIX E-11

GEORGE P. LEWNES
ATTORNEY AT LAW

MEMBER
N.Y. YORK & WASHINGTON, D. C.
BAR

6300 Martina Terrace
Lanham, Maryland 20
August 11, 1972

Honorable Colonel Chester Whiting,
President
Prince George's County School Board
Upper Marlboro, Maryland

Dear Sir:

This request is submitted on behalf of myself as a voting resident of the Prince George's County and on behalf of the President's Association in Prince George's County, an organization consisting of past and present presidents of PTA's and other civic organizations, all current voting residents of Prince George's County.

Upon information and belief the Prince George's County School Board is to hold a meeting on August 21, 1972, at 11:00 a.m. (EDT) for the purpose of voting on the adoption of one or more school busing plans for the County. Please advise me as to the following:

(1) Is a meeting scheduled to be held on August 21, 1972, at 11:00 a.m. (EDT) in Upper Marlboro.

(2) Under what section of the School Board's By-Laws was the meeting called.

(3) If the meeting is an emergency session under what section of the By-Laws was it called and the explicit reasons for such extraordinary action.

(4) Was public notice consistent with the By-Laws given of such proposed meeting and if so, where and when.

(5) The exact date when members of the School Board were advised of the scheduled meeting.

(6) The topic, plan, or plans to be discussed with some degree of specificity.

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(7) The exact date and time upon which the plan or plans were or are to be submitted to the individual members of the School Board. Similar information regarding submittal to the Superintendent of Schools.

(8) To what extent, if any, has the Superintendent of the Prince George's County Schools participated with and/or advised the School Board in any of the proposals to be acted on by the Board at said meeting.

(9) Please provide me with copies of any or all plans submitted or to be submitted to the Board for its consideration at the subject meeting.

I further formally request fifteen (15) minutes to address the Board at said meeting.

Your formal, immediate response is solicited so that I and the President's Association, individually or collectively, may take such action deemed appropriate, including but not limited to judicial relief, prior to the date upon wich the meeting is to convene.

Yours truly,

George P. Lewnes

cc: Members of the School Board

Received
August 11, 1972
[illegible]
Secretary
Bd of Ed

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APPENDIX

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Region III
220 Seventh Street, N. E.
Charlottesville, Virginia 22901

OFFICE FOR CIVIL RIGHTS

NOV 19 1968

Mr. William S. Schmidt
Superintendent
Prince George's County Schools
Upper Marlboro, Maryland. 20870

Dear Mr. Schmidt:

I have received and reviewed the plan for the desegregation of Fairmont Heights Senior High School and Mary Bethune Junior High School, which was approved by the Prince George's County Board of Education on November 11,

The plan has been submitted to this office in response to the request I made in my letter of September 5, 1968. At that time, I stated that measures previously submitted regarding the desegregation of certain elementary schools and of faculty would be recommended to the Director of the Office for Civil Rights as acceptable. My request called for the submittal of a plan which would accomplish the desegregation of all secondary schools, but directed specifically to Fairmont Heights Senior High School and Mary Bethune Junior High School.

With concurrence of the Director of the Office for Civil Rights, I am authorized to inform you that the plans submitted for the desegregation of all elementary schools and all secondary schools and for the professional staffs of these schools are accepted as meeting the requirements

[illegible] Public Schools

of Title VI of the Civil Rights Act of 1964. Specific [illegible] as to the plans [illegible] proposed at any time, [illegible] ability will be determined in view of the requirements of the law.

I wish to commend the Board of Education for its forthright leadership and high sense of responsibility in meeting [illegible] that not only meet the requirements of the law but which provide an equal educational opportunity for all [illegible] of the Prince George's County Public Schools.

[illegible] I express my appreciation of the courtesies and [illegible] extended to me and my staff by you and your [illegible] during our visits to those locations.

Sincerely yours,

[illegible]
Regional Civil Rights [illegible]

cc: [illegible]
Prince George's County Public School System

COPY

FILED
JAN 2 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 799

JESSE ALEXANDER ELLER, ET AL.,
Petitioners,

v.

BOARD OF EDUCATION OF PRINCE GEORGE'S COUNTY, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

PETER S. SMITH,
RICHARD V. FALCON,
DAVID S. BOGEN,
500 W. Baltimore St.,
Baltimore, Maryland 21201,

KENNETH L. JOHNSON,
GERALD A. SMITH,
HOWARD, BROWN AND WILLIAMS,
1500 American Building,
Baltimore, Maryland 21201,
Attorneys for Respondents,
Sylvester J. Vaughns, et al.

The Daily Record Co., Baltimore, Md. 21203

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 799

JESSE ALEXANDER ELLER, ET AL.,
Petitioners,

v.

BOARD OF EDUCATION OF PRINCE GEORGE'S COUNTY, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland, filed July 25, 1972 (Joint Appendix of the parties [J.A.] 256a), is unreported. The opinion of the United States District Court for the District of Maryland, filed August 31, 1972 (J.A. 326a) is unreported. The opinion of the United States Court of Appeals for the Fourth Circuit (App. A, p. A-1 of Petition) is reported *sub nom. Sylvester J. Vaughns, et al. v. Board of Education of Prince George's County, et al.* at ..... F.2d .

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether a statement by an administrator in the Department of Health, Education and Welfare (HEW), that a plan for desegregation of a school system was accepted as meeting the requirements of Title VI of the Civil Rights Act of 1964 prevents a court from finding that the system, segregated by law prior to 1954, had never dismantled its dual school system where, although blacks comprised less than 23% of the school system's population, in every year from 1954 to the present at least 60% of the black children attended predominantly black schools, and at least 66% of the white children attended predominantly white schools?

2. Whether petitioner intervenors were denied due process in being required to abide by their agreement to present no new evidence on whether the defendants had complied with constitutional requirements when their intervention occurred after the District Court had issued its opinion declaring that the defendants had not so complied?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provisions involved are Amendment V, Constitution of the United States—

> "No person shall . . . be deprived of life, liberty, or property, without due process of law."

and Amendment XIV, Constitution of the United States—

> "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The statutes involved are Title 42, United States Code § 1983—

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

and Title 42, United States Code § 2000d—

> "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

STATEMENT OF THE CASE

This suit was commenced March 29, 1972 by plaintiffs, the parents of eight children attending the Prince George's County public schools against the Board of Education of Prince George's County, its members, and the superintendent of schools, seeking declaratory and injunctive relief to remedy racial discrimination resulting in segregation of children and faculty and racial discrimination in the district's provision of public education (J.A. 6a).

Both parties filed an extensive joint stipulation of facts (J.A. 111a) and eighteen exhibits thereto (J.A. 153a-254a). The exhibits included a letter from the Director of the Office for Civil Rights of HEW stating that his office had approved the school district's plans in 1969, but that the plan was not adequate under the standards enunciated in *Swann v. Charlotte Mecklenburg*, so a new plan would be required (J.A. 249a-251a).

On July 25, 1972, the district court granted a motion of plaintiffs for summary judgment insofar as the motion sought a declaration that the defendants had not dismantled their dual school system or converted to unitary operation. It also ordered the defendants to continue to work on desegregation plans which were then in progress, to file a progress report on said plans on August 22, 1972 and set a hearing date on August 25, 1972, to consider the reports due on August 22, and the question of the type and nature of relief required.

On August 23, 1972, petitioners here filed a motion to intervene. Pending disposition of their motion, they participated in a limited way in the hearings which were held from August 25-31. On August 31, 1972, the district court filed an order and opinion (J.A. 326a) which directed the defendants to complete desegregation plans on a schedule which would desegregate only the elementary and the junior high schools by January of 1973 and defer desegregation of the senior high schools until September, 1973 and to present such plans on or before December 4, 1972 for hearing scheduled on December 11, 1972.

Petitioners motion to intervene was granted as of September 1, 1972 on condition *inter alia* that they were satisfied with their limited rights during the proceedings until the Court's order of August 31 and that they would present no new evidence relating to the issue of existing compliance with the standards of equal protection as opposed to evidence relating to questions pertaining to type and timing of relief. Counsel informed the court that this order was fully and completely acceptable to them and to their respective clients (Appendix D, p. D-3 to Petition).

Both the defendant school board and the intervenors appealed from the district court's decision of July 25 and

August 31, and the plaintiff cross-appealed from that portion of the district court's August 31 order which deferred senior high desegregation until September, 1973. On the appeals the Court of Appeals stated that the only substantial question of substance raised by any the appeals was whether the court could properly delay implementation of a plan for the senior high schools until September, 1973, and "that question is one that is, and will be, within the bosom of the District Court." The case was remanded for further proceedings in the district court, which proceedings are now under way.

ARGUMENT

As the Court of Appeals for the Fourth Circuit stated, petitioners here raise no substantial questions. On the basis of the facts stipulated by plaintiffs and defendants and not questioned by intervenors, defendants never operated a unitary school system. Their obligation to dismantle their dual school system was never discharged, and there is no conflict in any court decisions on this issue.

I.

THE DECISION BELOW IS CLEARLY CORRECT

A. *The Dual School System Was Never Dismantled.*

Prior to 1954, the schools in Prince George's County were segregated by law. In every year subsequent to that date, despite the fact that black children constitute less than 23% of the school population, at least 60% of the black children attended a school which was predominantly black, and at least 66% of white students attended schools which were predominantly white. Thus the dual school system was never effectively dismantled.

In school years 1955-65 the school system operated under a "freedom of choice" plan whereby at the end of the

1964-65 school year over 82% of the black students attended schools which were 100% black, and over 73% of the white students attended schools which were over 95% white (J.A. p. 218a).

Geographic attendance zones were established in 1965-66. This plan did not consider or use pairing or grouping of schools, or noncontiguous attendance zones or restructuring of grade levels or transportation of pupils as a means of discharging the boards duty to achieve "the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." *Davis v. School Commissioners of Mobile County*, 402 U.S. 33, 37 (1971). As a result, over 68% of the schools in the system remained in excess of 95% white or 95% black (J.A. 219a).

In 1969-70, the defendants, at the request of HEW, redrew attendance boundaries and changed pupil assignment criteria for 9 of their then 199 schools (J.A. 225-233a). Of the nine schools affected by the change, eight remain virtually all black to this day (J.A. 156a). One year after the adoption of this plan, 142 of 218 schools (65%) had student bodies in excess of 90% white or 80% black (J.A. 235a).

Petitioners apparently contend that the aforementioned plan converted Prince George's County to a unitary system, despite the fact that in this system which is three-quarters white, over 60% of the black children attend predominantly black schools. Petitioners base their assertion on a statement by an HEW official that the plan complied with the requirements of Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d). Such a statement does not even bind HEW with respect to further provision of federal assistance. The first statement by HEW was based on the assumption that adoption of simple geographic attendance zones sufficed to comply with defendant's duty

to desegregate, an assumption shown to be clearly wrong by this Court's opinions in *Swann v. Charlotte-Mecklenburg*, 402 U.S. 1 (1971) and *Davis v. Bd. of Commissioners*, *supra*. Recognizing its mistake, HEW has now stated that Prince George's County school system is not in compliance (J.A. 250a). In any event, a statement by an administrator in a situation in which plaintiffs were not represented cannot bind a court in a suit brought by the plaintiffs. Thus, this Court has previously found plans inadequate which HEW had approved. See *Raney v. Board of Education*, 391 U.S. 443 (1968).

B. *Intervenors Were Not Denied Due Process.*

1. INTERVENORS CONSENTED TO LIMITATIONS ON THEIR RIGHTS.

It is apparent on the face of the order permitting intervention that petitioner intervenors consented to the limitations on their position. That order provided, in part:

> "5. . . . In addition, unless this Court's order of July 25, 1972 is reversed in whole or in part by the United States Court of Appeals for the Fourth Circuit, the intervenors shall not seek to present to this Court any evidence, testimonial or documentary, other than that which was presented to this Court by joint stipulation of the parties prior to July 25, 1972 and made a matter of record herein, relating to the issue of compliance or non-compliance with the standards of *Brown I*, *Brown II*, and Swann, as opposed to evidence relating to questions pertaining to type and timing of relief. Intervenors shall of course have the opportunity to present such latter type of evidence subject to the provisions of this Order.
>
> 6. Counsel for the parties have orally informed the Court that the within Order, and each and every one of its terms and provisions, is fully and completely acceptable to them and to their respective clients" (Appendix D, p. D-2, 3 of Petition).

Petitioner intervenors apparently regret their choice, for it prevents them from reopening the decision of the Court which was made prior to their motion to intervene, and thus prevents them from delaying desegregation of the school system. But binding intervenors to an agreement knowingly made is hardly a denial of due process.

2. INTERVENORS PROFFER OF "NEW EVIDENCE" IS IRRELEVANT.

Petitioner intervenors claim denial of due process because the letter from HEW in 1969 stating that Prince George's County had complied with Title VI was not in the record. However, that letter added no new fact of significance. The specific plan desired by HEW was in the record (J.A. 225a et seq.) the consequence for particular schools are in the record in the annual enrollment breakdown of the schools (J.A. 156a et seq.) and the fact that HEW had approved the plan was in the record, contained in the letter from the Director of the Civil Rights Division of HEW stating that such earlier approval had been given but was in error (J.A. 249a).

Petitioners also state that they wish to present evidence of "causes which resulted in changing the racial makeup of the schools since 1969." (Petition, p. 5). Since there was no dismantling of the segregated system in 1969, such proof is not relevant to show that the school district has complied with the requirements of *Swann*, *supra*.

II.

THERE IS NO CONFLICT OF DECISION

The decision here is completely consistent with the decision of the Maryland Court of Appeals in *Borders v. Board of Education*, 265 Md. 488, 290 A.2d 510 (1972). That case involved a challenge by white parents seeking

to prevent even the small modicum of desegregation which the Board had attempted at the urging of HEW. Since the issue before the court was the authority of the school board to take some steps towards desegregation, the court did not need to decide whether the segregation in Prince George's County was *de facto* or *de jure*. Obviously in a suit brought by white parents seeking to prevent even modest desegregation against a school board only reluctantly willing to desegregate in the face of threats of federal fund cut offs, neither side contended that any of the existing segregation was *de jure*. The court proceeded on the basis that the board acted within its power even if the system had been *de facto*, but it did not commit itself as to whether the system was in fact *de facto* or *de jure*. It did say, however, "an indefinite continuation of the present attendance lines might well raise such a presumption [that the failure to redraw attendance lines was racially motivated]." Thus, the only decision in any court as to the nature of segregation in Prince George's County schools is that of the federal court in this case. And, as the Fourth Circuit indicated upon its review of that decision, it was clearly consistent with earlier decisions of the Fourth Circuit and this Court.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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December 29, 1972.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29 day of December, 1972, two copies of the foregoing brief were mailed, postage prepaid, to Emmett H. Nanna, Jr., Esquire, and Richard A. James, Esquire, 5132 Baltimore Ave., Hyattsville, Maryland 20781; and Paul M. Nussbaum, Esquire, 3723 - 34th Street, Mt. Rainier, Maryland, 20822.

BY: GERALD A. SMITH